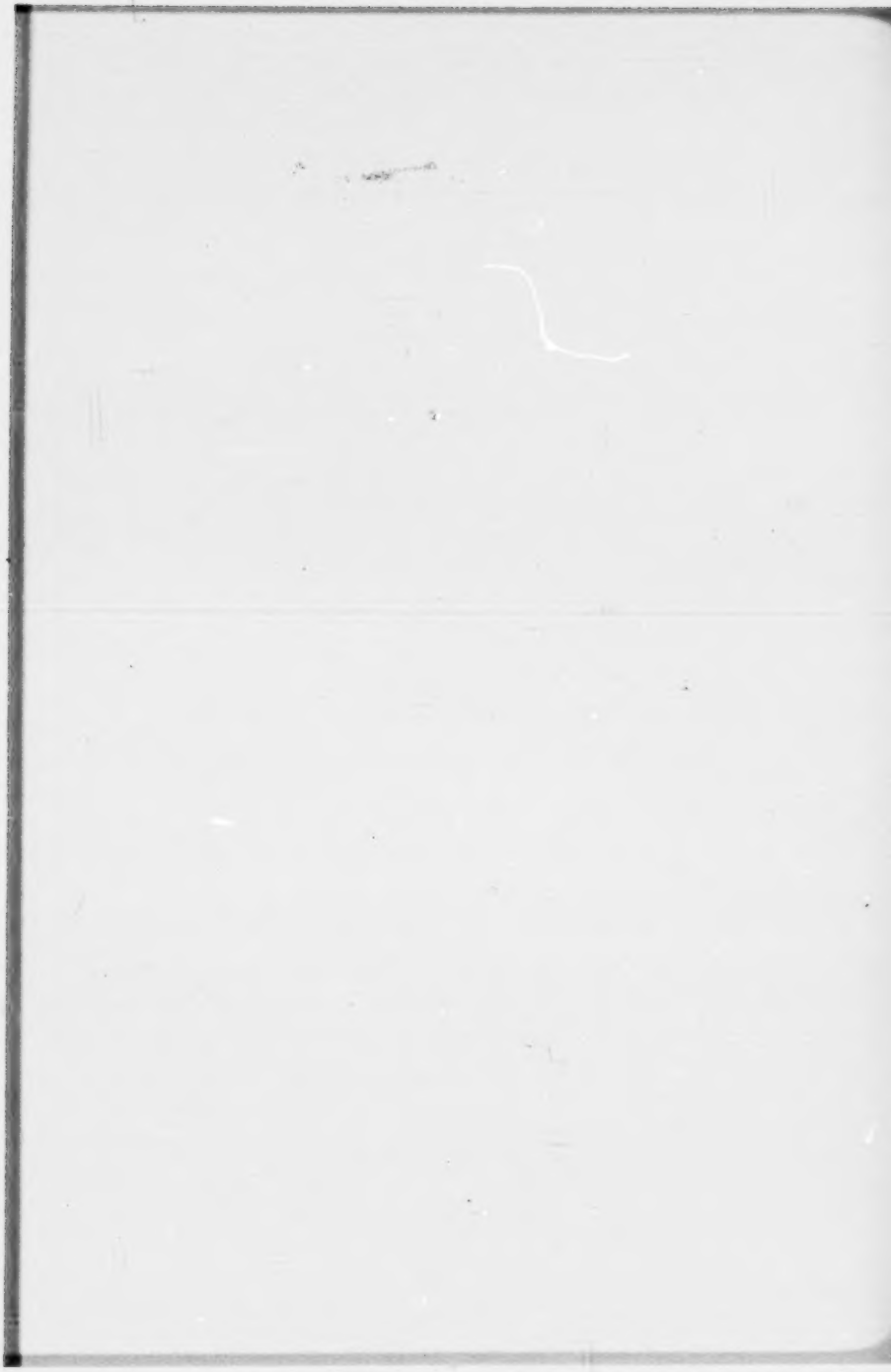

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1221

JANE CROZIER, ROBERTA GIESECKE AND HARRIET M. ACKERT,

Petitioners,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND AND BRIEF IN SUPPORT THEREOF.

HAROLD C. ACKERT,
JOHN W. GIESECKE,
Counsel for Petitioners.

ACKERT, GIESECKE & WAUGH,
Of Counsel.

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To The Honorable Justices of the Supreme Court of the United States:

The Petition of Jane Crozier, Roberta Giesecke and Harriet M. Ackert respectfully shows this Honorable Court:

A

Summary Statement of Matter Involved

The cause herein was originally instituted by the Baltimore & Ohio Railroad Company as a proceeding for a railroad adjustment under Chapter XV of the Bankruptcy

Act. The said cause was duly instituted by the filing of a petition in conventional form whereupon a special three-judge court, sitting as the District Court for the District of Maryland, was duly convened in the manner prescribed by Chapter XV of the Bankruptcy Act. The hearing provided by Sections 713 and 714 of said Chapter XV of the Bankruptcy Act was held on July 10, 1945, and at the close of said hearing the Court made statutory findings that the Petition was properly filed. In accordance with the Court's Order a hearing as required by Section 720 of said Act was duly held on September 17-21, 1945. At that time these Petitioners appeared and filed their Intervening Petition and Objections (R. 120), among which objections so filed with respect to the Plan as it affected the Baltimore & Ohio Railroad Company's Five Per Cent (5%) Refunding Mortgage Bonds, Series F, due 1996, was the following specific objection:

> "The Adjustment Plan in the last paragraph of Article II, Par. 6, provides for the removal of a contractual restriction, contained in Article Seven, Par. 3, of the Refunding Mortgage and in Article Seven, Section 1 of the Supplemental Indenture thereto, against extension of any debt hereafter created and outstanding, and against extension of any senior debt presently outstanding and maturing after December 31, 1946 except with the consent of 66⅔% in principal amount of the Refunding Bonds. Such elimination of said restriction would be highly inequitable and tend to destroy any certainty holders of Refunding Bonds might have as to the ultimate retirement of senior indebtedness. The mere fact the company seeks a removal of such restriction by the present plan (which ostensibly looks forward sixty years) indicates a doubt on the part of the company as to the adequacy of the present proposed extension and adjustments. If the present plan is workable, feasible, and fair to the security holders, then no such elimination of the contractual rights of holders of Refunding Bonds against

further extensions should be needed. This Court in 1939 found that the 1938 Plan was not likely to be followed by the need of further financial reorganization or adjustment. Now, only six years later, it seems necessary, but surely no such drastic removal of an existing restriction now seems necessary because the partial removal of the restriction in the 1938 Plan was deemed adequate at a time when the Railroad was in a far more critical financial condition. To grant such a right to the Company would be, in effect, an unauthorized delegation of this Court's power to grant such extensions without submitting the matter to the jurisdiction of the court. Furthermore, it would grant to the Company a greater right of modification than is granted by Chapter XV, in that such Chapter requires approval of any such modification by 60% of bonds of each issue and 75% of all bonds affected thereby. By this provision sought in the Adjustment Plan, the Company seeks to gain an advantage not even authorized by Congress to come under the scrutiny of the court and the Interstate Commerce Commission. It is submitted that the provision approved by this court in the 1938 Plan is adequate, feasible, and as far as this court should go, both in law and as a matter of good conscience."

At the time the Refunding Bonds were issued, Article Seven, Section 3, the mortgage securing the same (R. 961) contained an express contractual provision prohibiting the extension or renewal of any prior lien indebtedness, reading in part as follows, to-wit:

> "will not extend or renew any of such outstanding existing bonds so long as they are not deposited hereunder (except as aforesaid) and will not cause or suffer the same to be extended or renewed."

It was the admitted purpose of this provision to ultimately funnel all of the secured indebtedness of the company into this General and Refunding Mortgage (which at

its inception was a second mortgage) with the necessary result that the Refunding Mortgage would become a first lien.

Prior to the filing of the Railroad's Petition and in 1938 the Baltimore and Ohio Railroad Company had filed in the same Court a proceeding under the then Chapter XV of the Bankruptcy Act and in such proceeding proposed a plan of modification which was subsequently approved by the Court and effectuated by an instrument making appropriate changes in the bonds and the indenture securing them which provided among other things for certain adjustments which modified the above-set-out provision restricting extensions of prior-lien indebtedness so that any senior bonds of maturities after January 1, 1947, could be extended or renewed with the consent of the holders of sixty-six and two-thirds per cent (66⅔%) of the principal amount of Refunding Bonds at the time outstanding. The original mortgage securing said bonds was modified by a supplemental indenture dated January 1, 1940 (R. 1105), which provided in Article Seven, Section 1 thereof, as follows (R. 1105):

> "There is hereby added after the second paragraph of Section 3 of Article Seven of the Refunding Mortgage a new paragraph as follows:
>
> 'Notwithstanding the foregoing provisions, the Railroad Company hereby expressly reserves the right to extend (on such terms and for such periods as the Railroad Company may from time to time determine) (a) any bonds or other indebtedness of any issue, all or any part of which was outstanding in the hands of the public on August 15, 1938, secured by a lien senior to that of the Refunding Mortgage and maturing prior to January 1, 1947, and (b) with the consent of holders of 66⅔% in principal amount of the Refunding Bonds at the time outstanding (excluding bonds pledged to secure other obligations of the Railroad Company and bonds in the treasury

of the Railroad Company) any such senior bonds or indebtedness of any later maturity or maturities.' "

As consideration for the adjustments made under the 1938 Plan with respect to the Refunding Mortgage Bonds, the holders thereof were given a new and additional right whereby they were granted the privilege of converting their Refunding Bonds into stock at a price specified in the Plan.

Under the 1944 Plan (R. 78), the one here under consideration, it was specifically provided:

> "The Supplemental Indenture will also provide for the removal of any and all existing restrictions upon the extension, renewal or refunding of bonds of any issue or series, or any other debt, now or hereafter outstanding or pledged, secured by a lien senior to that of the Refunding Mortgage, to the end that any bonds or debt may be extended, renewed or refunded at any time, or from time to time, without the consent of the Refunding Bondholders or any of them."

The provision just quoted (which in reality would permanently relegate the Refunding Bonds to a secondary lien position instead of ultimately becoming a first lien as originally contemplated) is the one at which these Petitioners levelled their Objection No. 7 above set out. Nevertheless the Court below approved this provision of the Plan and approved a new Supplemental Indenture which specifically eliminated both the complete restriction as contained in the original Refunding Mortgage as well as the limited restriction requiring consent of the holders of two-thirds (⅔) of the Refunding Bonds as a condition precedent to any extension of prior lien indebtedness.

Other matters were, of course, embodied in the Objections filed by these Petitioners, and the Court's approval of the Plan, but statements relating thereto are here unnecessary as this petition is directed to the approval by the Court

below of this one particular provision of the Plan and the instruments intended to implement and effectuate the same and its overruling the objections of these Petitioners to that provision.

In reaching its conclusion that this provision of the Plan should be approved, the Court overlooked or ignored a basic objection to the elimination of the restriction against extension, namely, that it deprived Petitioners and other bondholders similarly situated of a vested contractual and property right without any compensation and went beyond the scope of a debt adjustment that is authorized by Chapter XV of the Bankruptcy Act. The Court disposed of the objection by saying, in part (63 F. Sup. l. c. 568): "Some of the intervenors (referring to these Petitioners) object to the features of the present plan which provide for refunding[1] the prior lien issues which, of course, is necessarily inconsistent with the covenants in the original refunding and convertible indentures." The Court then proceeded to dispose of the objection in the following very brief manner: "But as we have previously pointed out, we consider the refunding provisions of the present plan to be of real importance to the plan as a whole and really in the interest of all classes, including the refundings and convertibles, because it is quite possible that this privilege of refunding may take advantage of even existing lower interest rates with consequent reduction of interest charge." The Court did not review or discuss the applicable law. The objection was again called to the attention of the Court in these Petitioners' Motion for Reconsideration (R. 1625) but was again overruled by the entry of the Decree (R. 1936) (Order No. 4).

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[1] It should be noted here that the Court below misconceived the scope of the objection, as no objection was made to "refunding" provided the maturity date of the bonds as extended by the 1944 Plan was not further extended or renewed.

B

Statement Disclosing Basis of Jurisdiction

(1) The date of the Decree (Order No. 4), in this case was March 13, 1946.

(2) The jurisdiction of this Court is based upon the express language of Section 745 of Chapter XV of the Bankruptcy Act U. S. C. A. Title 11, Sec. 1245 and upon Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, U. S. C. A. Title 28, Section 347.

C

Questions Presented

(1) Whether the strict priorities rule as between stockholders and creditors and various classes of creditors and the requirement of "fair and equitable" as enunciated by this Court in *Northern Pacific* v. *Boyd*, 228 U. S. 482, 57 L. Ed. 931, *Case* v. *Los Angeles Lumber Products Company, Ltd.*, 308 U. S. 106, 84 L. Ed. 110, and kindred cases is applicable to a proceeding under Chapter XV of the Bankruptcy Act.

(2) Whether the deletion of the restrictive covenant against extension or renewal of prior liens as contained in the original indenture securing the Refunding Bonds and as modified by the Supplemental Indenture adopted and approved under the 1938 Plan violates such doctrine or goes beyond the jurisdiction conferred on the Court by Chapter XV of the Bankruptcy Act so as to prevent approval of the Plan unless modified by eliminating therefrom the provision removing such restrictive covenant.

(3) In the interests of brevity (*Rule 38, Paragraph 2, Furness Whitey Company, Ltd.* v. *Lang Tsze Insurance*

Association, Ltd., 242 U. S. 430), Petitioners do not at this time set forth all of the questions which will be urged in the argument of the merits of this cause, should the writ be granted, nor all of the contentions in support of such questions, but in order to comply with the rule of this Court requiring that all issues upon which a decision is requested be presented in the Petition for Certiorari (*Gunning* v. *Cooley*, 281 U. S. 90, 98), Petitioners here refer to and incorporate into this petition all of the matters presented in their Praecipe for Record filed herein (R. 2033) (specifically paragraphs numbered 1 to 6 thereof) as points on which they intend to rely with the same force and effect as if herein set out in full.

D

Reasons Relied Upon For the Allowance of the Writ

Chapter XV of the Bankruptcy Act is an integral part of the bankruptcy legislation of this country and deals particularly with the adjustment of railroad finances. The exact scope of and the power of the court granted by this act have never been passed upon by this Court, with the result that the precise question as to how far the act permits adjustments to operate and whether actual cancellation of vested rights and express contract provisions of non-assenting bondholders is or could be authorized has never been authoritatively established.

In proceedings under this Act, in opinions expressed by legal and lay experts [2] and writers, the scope of the Court's

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[2] Mr. Harry Haggerty, Vice-President and Treasurer in charge of investments of the Metropolitan Life Insurance Company, testified before the Senate Committee on Interstate Commerce on November 7, 1945 in connection with the hearings on Senate Bill 1253 as follows: "However, the lawyers of the Delaware and Hudson maintain that under the McLaughlin Act (Chapter XV) you could do just one thing, extend maturity, that you could do nothing else. Now if that is true—there is a difference of

jurisdiction under Chapter XV has been repeatedly questioned. The precise question here presented, to-wit, whether the *Boyd* and *Los Angeles Lumber Products Company* cases are applicable to Chapter XV proceedings, has likewise been the subject of much learned speculation and still remains unanswered.[3] This has served as a hindrance to the preparation of plans, the judicial approval thereof, and has raised serious questions as to the necessity of further legislation [4] to solve the financial difficulties of American railroads.

Although the Court below does not specifically cite the *Boyd* or the *Los Angeles Lumber Products Company* cases, it seems hardly likely that the Court below thought the strict priorities standard was required. As the plan was not submitted to stockholders for their assent, it may be assumed that their interests were not adversely affected. Admittedly the Refunding Bondholders are required to make concessions under the Plan, and it is difficult to see how the Court could have concluded as it did that the Plan was "fair and equitable" as an adjustment had it been applying the strict priorities doctrine of the *Boyd* and *Los Angeles* cases. An authoritative decision as to whether the

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opinion among lawyers—there should be some way of giving greater latitude in the way of permitting comprehensive debt adjustment." Hearings before Committe on Interstate Commerce, United States Senate, First Session, on Senate 1253, page 29.

[3] See University of Chicago Law Review, February, 1940, page 203; Corporate Reorganizations and American Bankruptcy Review, January 1946, page 136, dealing with the decision below in this case. Also see Gerdes in 1942 Annual Survey of American Law, page 555 (New York University School of Law, 1945), expressing the opinion that the strict priorities rule applies.

[4] There is pending in Congress at the present time S. 1253 dealing with voluntary modifications of railroad financial structures where the precise scope of Chapter XV has repeatedly been under question. See hearings cited in Footnote 2 above; also see article in Traffic World, March, 1946, pp. 672 et seq.

absolute priorities doctrine is applicable to Chapter XV plans and whether concessions from stockholders must be required is of fundamental importance to large numbers of railroad security holders, to many railroads, to the trial courts convened under Chapter XV and to Congress. Basic also is the question whether the Act authorizes anything more than extensions and deferments as distinguished from the absolute annihilation of vested property rights.

E

Wherefore, it is respectfully submitted that the Writ of Certiorari herein applied for should be granted to review the judgment of the special three-judge court, sitting as the District Court for the District of Maryland.

HAROLD C. ACKERT,
JOHN W. GIESECKE,
Counsel for Petitioners.